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IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA, *et al.*,

Petitioners,

v.

NANCY WYMAN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, GENERAL COMMISSION ON UNITED METHODIST MEN OF THE UNITED METHODIST CHURCH AND NATIONAL CATHOLIC COMMITTEE ON SCOUTING AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are the largest religious sponsors of Scouting in America. Collectively, they charter tens of thousands of Scouting units serving over a million boys; their experience with Scouting at all levels is extensive. *Amici* support and employ the Scouting program of the Boy Scouts of America (the "BSA") as a means of religious ministry and outreach. They have a direct and profound interest in seeing that government is not permitted to discriminate against or disadvantage the BSA or its affiliated groups because of the BSA's constitutionally protected viewpoints or related membership policies. In *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), these *amici* submitted an *amici curiae* brief supporting the BSA's right to limit leadership positions to those whose expression, conduct, and values are consistent with Scouting's basic precepts. This Court held that an anti-discrimination law compelling the admission of an avowed homosexual as a Scout leader violated the BSA's First Amendment rights. *Id.* at 656, 659. In this case, *amici* join to support the BSA in seeking review of a decision allowing a transparent government end-run around *Dale*. *Amici* are deeply concerned that the decision below will have a significant adverse impact on the BSA and its sponsors throughout the nation. More broadly, the decision below threatens all religious organizations, like these *amici*, that have faith-based membership criteria.

1. *Amicus* The Church of Jesus Christ of Latter-day Saints sponsors over 399,000 Scouts and over 34,000

1. Counsel for *amici* state that they authored this brief in whole and that no person or entity, other than *amici*, made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of *amicus curiae* briefs.

Scouting units nationwide, making it the largest sponsor of Scouting in the United States.

2. *Amicus* General Commission on United Methodist Men of the United Methodist Church ("United Methodist Men") is the church-wide organization within the United Methodist Church authorized to oversee and coordinate the denomination's Scouting ministries. As the second largest sponsor of Scouting in the nation, the United Methodist Church sponsors over 397,000 Scouts and over 12,000 Scouting units.

3. *Amicus* National Catholic Committee on Scouting ("NCCS") oversees the Catholic Church's Scouting ministry. The purpose of the NCCS is to utilize and ensure the constructive use of the Scouting program as a viable form of youth ministry within the Catholic Church. Nationwide, Catholic dioceses, parishes, schools and churches sponsor and support approximately 332,000 Scouts and 9,700 Scouting units, making Catholic institutions the third largest sponsors of Scouts and Scouting units in the United States.

REASONS FOR GRANTING THE PETITION

The petition raises an issue of national scope and importance that richly warrants this Court's consideration. Scouting exists to develop certain character traits in boys through a program of adventure and education that is supportive of faith in God and traditional sexual morality. As this Court held in *Dale*, because Scouting is an expressive association the BSA's leadership and membership decisions are protected by the First Amendment against government interference. 530 U.S. at 656, 659. Since *Dale*, however, a widespread effort has arisen to use anti-discrimination laws

to expel the Boy Scouts from public facilities and programs because of their constitutionally protected policies regarding atheists and homosexuals. This case represents one such attempt. The State of Connecticut excluded the Boy Scouts from its State employee charitable campaign precisely because of such policies. Despite the participation of 900 organizations of every type in the campaign, the Second Circuit upheld the exclusion on the ground that the State has the power to condition the Scouts' participation on the relinquishment of their First Amendment rights so long as no direct compulsion is involved.

The decision below presents a serious threat to Scouting across the nation. To a great degree, Scouting depends on access to public facilities and lands to carry out its program of character education. Scouting is also benefitted in vital ways by its longstanding participation in various government programs that are broadly available to nonprofit civic and cultural institutions, such as the charitable campaign at issue here. The decision below would permit the government to exclude the Scouts and affiliated groups from a wide array of government facilities, lands, programs, and benefits unless they agree to forfeit their constitutional rights. More broadly, the decision creates serious concerns that government would likewise be able to discriminate against numerous religious organizations, like these *amici*, that have faith-based membership criteria.

I. The Decision Below Creates A Nationwide Threat To Scouting.

The decision below provides government at all levels with a legal justification and blueprint for using anti-discrimination laws to expel the Boy Scouts from numerous

public facilities, lands, and programs that are broadly available to other nonprofit organizations. It is increasingly clear that opponents of the BSA's beliefs and membership policies intend to use such tactics either to compel it to change its fundamental viewpoints or to exact a crushing price for resisting.

A. Like Many Other Nonprofit Organizations, the Boy Scouts Depend on Access to Public Facilities; Loss of Such Access Would Have a Serious Adverse Effect on Scouting.

The Scouting movement exists to instill in boys traditional values, practical skills, and the mores of good citizenship in a context of fun and adventure. *Dale*, 530 U.S. at 649-50. Among these values is a norm of conservative sexual morality, which is most effectively taught through the quiet examples of adult Scout leaders whose lives model that ethic. *See id.* at 651-55. Although the BSA itself is a national organization, the day-to-day work of teaching and modeling Scouting's precepts occurs at the local level – in Boy Scout Troops and Patrols, Cub Packs and Dens. Most who work in Scouting units (Troops and Packs) are unpaid volunteers, usually dads and moms. Scouting units are rarely well off. Many exist in difficult neighborhoods and serve underprivileged boys. They are commonly sponsored by local churches and other nonprofit organizations. Most units have limited resources, surviving on modest budgets with funds raised through car washes, popcorn sales, "Scout-O-Ramas," and appeals to fellow church members.

As a nonprofit association, the Boy Scouts depend on access to government-owned facilities, lands, and programs. Scout Troops often meet after hours in public school classrooms. With the cooperation of local officials, they visit fire

and police stations to learn about public safety, first aid and emergency preparedness, and city halls to learn about government and democracy. Boy Scout camping trips – which are fundamental to the Scouting program – typically involve the use of public lands, wilderness areas, or waters. The Sea Scouts depend on access to public marinas. Public parks are often the site of Scouting activities. And as this case illustrates, the BSA raises much needed funds through public employee campaigns. Many more examples could be given of instances where the Boy Scouts depend on public access.

In most cases, access to such government facilities and benefits is broadly available to nonprofit charitable organizations, sometimes at a discount or even free of charge. *See, e.g., Evans v. City of Berkeley*, 127 Cal. Rptr. 2d 696 (Cal. Ct. App. 2002), *review granted*, No. S11261 (Cal. 2003) (free berthing rights at marina available to nonprofit service organizations but denied to Scouts). Denying such access – or compelling payment of rates applicable to for-profit entities – would have a grave impact on the ability of Scouting units to function and even survive. For example, the Berkeley Sea Scouts have long served low-income youths of all races and backgrounds with their seamanship program. The City of Berkeley grants free berthing rights at the Berkeley Marina to service-oriented nonprofit organizations, and for over six decades the Sea Scouts had used the Marina without charge. *See id.* at 698, 700. However, the City recently revoked the Sea Scouts' free berthing rights under the same anti-discrimination rationale that the State used here. *See id.* at 698. As a result, the cost for the Sea Scouts to berth their ships rose from nothing to $21,000 per year. All but one of the Sea Scout vessels had to leave the Marina, and in the case of that vessel the volunteer skipper who once paid the cost of activities for low-income kids can no longer afford

to do so because he must pay the expensive berthing fee out of his own pocket. Consequently, activities have been significantly reduced and many disadvantaged youth have been forced to quit the Berkeley Sea Scout program. *See id.*, Clerk's Transcript on appeal to California Supreme Court, at 169, 271, 273-75. A similar result will occur anywhere that the Boy Scouts' access to public facilities is cut off or made prohibitively expensive.

B. Opponents of the BSA's Membership Policies Seek to Expel Scouting From Public Facilities.

Ideological opponents of the BSA's viewpoints regarding homosexual conduct and atheism are well aware that local Scouting units depend on access to public lands, facilities, and programs. Particularly since *Dale*, these opponents – both inside and outside government – have sought to retaliate against the Boy Scouts for their views by expelling them from these public venues or limiting their access. Cutting through the State's rhetoric, the instant case is one example of this phenomenon. Several others are reviewed in the petition (at 23-25). The obvious goal of this effort is to compel the Boy Scouts to abandon their viewpoints or, failing that, to exact a steep price for their refusal. This troubling strategy is acknowledged by activists.[2]

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2. *See* American Civil Liberties Union of San Diego and Imperial Counties, *Special Feature* (visited Feb. 2, 2004) <http://www.aclusandiego.org/boy_scouts/> (detailing efforts to expel the Boy Scouts from public facilities); Robert R. Raketty, *Letter to Portland Superintendent and School Board* (visited Feb. 2, 2004) <http://www.scoutingforall.org/aaic/2003101401.shtml> (letter to Portland public school officials from official of "Scouting for All" organization advocating against "[a]llowing the Boy Scouts of

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C. In Direct Conflict With Established Precedent, the Decision Below Threatens the Viability of Scouting by Permitting the State to Exclude the Boy Scouts from Public Facilities and Programs that Are Broadly Available to Other Nonprofit Organizations Based on the Exercise of the BSA's Constitutional Rights.

The decision below directly conflicts with this Court's precedent by permitting the State to condition participation by the Scouts in the State employee charitable campaign on the relinquishment of the BSA's constitutional rights. The rule established below would allow government to manipulate anti-discrimination laws to exclude the Boy Scouts from numerous government benefits that are broadly available to other nonprofit organizations.

1. As this Court has stated, it is "beyond debate" that the "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the [Constitution]." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958); *Healy v. James*, 408 U.S. 169, 181 (1972) ("Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs."). The "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends" has long

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America . . . use of school facilities and [the] ability to recruit either in-person or through school mail . . . ."); *see also* Peter Ferrara, *The War on the Boy Scouts: The ACLU Never Sleeps*, The Weekly Standard, Sept. 29, 2003, Vol. 009, Issue 03 (noting organized efforts "to harass the Scouts and if possible drive them from the public sphere").

been a defining characteristic of American liberty. *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). Throughout our history, this right has been "especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." *Id.*

It is also well established that the First Amendment prohibits more than just targeted assaults on free speech and expressive association rights. *Dale*, 530 U.S. at 648 ("Government actions that may unconstitutionally burden this freedom may take many forms."). This Court in *Dale* specifically considered and rejected the argument that an anti-discrimination law had only an "incidental effect on protected speech" and thus did not merit strict judicial scrutiny. 530 U.S. at 659. Although the law at issue was generally applicable and viewpoint neutral on its face, and although it did not directly target the BSA's speech, this Court nevertheless held that it "directly and immediately *affects* associational rights, in this case associational rights that enjoy First Amendment protection." *Id.* (emphasis added). The "state interests embodied in New Jersey's public accommodations law" were insufficient, this Court held, to justify the "intrusion on the Boy Scout's rights to freedom of expressive association." *Id.*

Likewise, in *Elrod v. Burns*, 427 U.S. 347 (1976), this Court struck down patronage dismissals because "[t]he belief and association which government may not ordain directly are achieved by indirection." *Id.* at 359. The Court set forth the "exacting scrutiny" such abridgments must survive (*id.* at 362) and then stated that "*[t]his type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result*

of the government's conduct." *Id.* at 362 (emphasis added). That the burden on First Amendment rights is an incidental result of the government's policies is no justification.

A closely related principle is that government may not condition the receipt of benefits on the abandonment of First Amendment rights. That is no more constitutional than directly punishing the exercise of such rights. In *Speiser v. Randall*, 357 U.S. 513 (1958), California had established a rule conditioning a property tax exemption on the signing of a declaration stating that the person did not advocate the forcible overthrow of the United States government. This Court rejected the distinction between government directly punishing someone for exercising First Amendment rights and government denying benefits for refusing to give up such rights. *Id.* at 518 ("To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech.").

Since *Speiser*, this Court has repeatedly held in a variety of contexts that government cannot deny benefits because of the exercise of First Amendment rights – including the right of expressive association – nor condition the receipt of benefits on the relinquishment of such rights. *See Roberts v. Jaycees*, 468 U.S. 609, 622 (1984) ("Government actions that may unconstitutionally infringe upon [the right of expressive association] can take a number of forms" such as where the government "seek[s] to impose penalties or *withhold benefits from individuals because of their membership in a disfavored group*.") (emphasis added). In *Perry v. Sinderman*, 408 U.S. 593 (1972), for example, a university's board of trustees voted not to renew an untenured professor's contract because of his association with a group critical of the university's policies. Although the professor

had no right to university employment in the first place because he lacked tenure and his contract had expired, this Court nevertheless held that the university could not deny him employment because of his speech and associations:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech. *For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.* This would allow the government to "produce a result which [it] could not command directly." Such interference with constitutional rights is impermissible.

Id. at 597 (internal citation omitted; emphasis added).

Similarly, in *Healy*, a university denied a student group official recognition because of its affiliation with a national group known for violent and disruptive tactics. With much the same rationale used by the State here, the university argued that the denial was constitutional because it had taken no direct action to restrict the group's rights and because the group remained free to advocate its views without university benefits. The Court rejected this argument:

> [T]he Constitution's protection is not limited to direct interference with fundamental rights.

> The requirement in [*NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958)] that the NAACP disclose its membership lists was found to be an impermissible, *though indirect*, infringement of the members' associational rights. Likewise, in this case, the group's possible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed by the President's action. We are not free to disregard the practical realities. Mr. Justice Stewart has made the salient point: "*Freedom such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.*" *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960).

408 U.S. at 183 (emphasis added).

This Court has applied the protections established in the foregoing decisions to diverse facts involving various types of government restrictions:

> [This Court's] unconstitutional conditions precedents span a spectrum from government employees, whose close relationship with the government requires a balancing of important free speech and government interests, to claimants for tax exemptions, *Speiser v. Randall*, 357 U.S. 513, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958), users of public facilities, *e.g.*, *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 390-394, 113 S. Ct. 2141, 21462148, 124 L. Ed. 2d 352 (1993); *Healy v. James*, 408 U.S. 169, 92 S. Ct. 2338, 33 L. Ed. 2d 266 (1972), and recipients

> of small government subsidies, *e.g.*, *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 104 S. Ct. 3106, 82 L. Ed. 2d 278 (1984), who are much less dependent on the government but more like ordinary citizens whose viewpoints on matters of public concern the government has no legitimate interest in repressing.

Board of County Comm'rs v. Umbehr, 518 U.S. 668, 680 (1996); *see also Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819 (1995) (striking down denial of benefits for student religious publication); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001) (unconstitutional to deny religious club use of school facilities).

In brief, because "constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental [efforts] that fall short of a direct prohibition against the exercise of First Amendment rights," this Court's "modern 'unconstitutional conditions' doctrine holds that the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit" in the first place. *Umbehr*, 518 U.S. at 674 (internal quotation marks and citations omitted). Government may not punish or withhold benefits from individuals or groups because of their political, social, or religious affiliations. As this Court held in *Roberts*, the First Amendment protects expressive associations – and the membership distinctions they must make to preserve and express their views – from government proscription, penalties, or retaliation. Government may interfere *only* if it "serve[s] compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* at 623.

2. The court below based its decision on the factual assumption that the BSA was ejected from the State campaign because of the exercise of its constitutional rights. Appendix to Petition ("App.") at 18a ("[W]e must assume that the removal of the BSA from the Campaign was triggered at least to some extent by the BSA's exercise of what the Supreme Court has held to be a constitutionally protected right."). Thus, the court's holding was that the State can constitutionally deny a nonprofit expressive association access to a government program that is broadly available to hundreds of other diverse nonprofit organizations specifically because of the exercise of its First Amendment rights. As explained above and in the petition, this holding creates an intolerable conflict with the entire line of unconstitutional condition cases.

The Second Circuit sought to distinguish between laws that directly compel an expressive association to admit someone who would interfere with its message and laws that merely force the association to "pay[] a price" for not admitting such persons. App. at 26a, n.8. But that is the very sort of direct vs. indirect distinction this Court rejected in cases like *Patterson*, *Healy*, and *Elrod*.

The court also attempted to draw a distinction between viewpoint discriminatory laws that aim at the suppression of ideas and those that impose a "differential adverse impact" on efforts to voice those ideas "through the medium of expressive association." App. at 20a-23a. It is noteworthy, however, that even Judge Calabresi, the author of the majority opinion, pronounced himself "skeptical of . . . [this] distinction." App. at 20a-21a, n.5 (writing for himself).[3] Indeed, the

3. Judge Calabresi instead intimated that the better approach would discard that distinction, acknowledge the government (Cont'd)

distinction makes no sense where a constitutional right precludes the government from prohibiting certain conduct in the first place but then the government conditions receipt of a broadly available benefit on the relinquishment of that right. Put differently, the distinction the court attempted to draw may make sense where the government has the right to ban the expressive conduct (*e.g.*, public flag burning) because the action it entails is unlawful under a viewpoint neutral and generally applicable law (*e.g.*, an ordinance prohibiting outdoor fires). *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 385 (1992). But the distinction fails where the expressive conduct itself (*e.g.*, adherence to the BSA's membership and adult leadership criteria) is protected by the First Amendment from government proscription. And it becomes utterly tenuous where the government demands not just that the expressive conduct cease but in effect that it be altered in a way that expresses a contrary message. That is exactly the case here.

Where the principal means of expressing and teaching a particular message is to model it through personal conduct, a ban on that conduct (or a condition that one engage in the opposite conduct) works to suppress (or outright change) the message. One can publically express hatred toward America in dozens of effective ways other than burning the American flag in violation of an outdoor fire ordinance. But if the prime way the BSA instills traditional sexual morality in boys is through the selection of adult leaders who are living examples of that norm, to punish the BSA for not selecting a leader who

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infringement on the freedom of association, and then determine whether the infringement can be justified under the compelling interest test. However, he (erroneously) felt himself bound by an approach that affords no protections from purportedly indirect burdens. *Id.*

exemplifies a different sexual norm is to punish it precisely for its viewpoint – indeed, for failure to express a contrary viewpoint. The effect is to penalize what may be the sole means of expressing a particular message.

3. The Second Circuit's holding creates a profound nationwide threat to the Boy Scouts. There is nothing in the court's decision that would prevent the use of anti-discrimination requirements to expel the Boy Scouts from numerous government facilities, properties, and programs to which many other nonprofit organizations enjoy access. To be sure, the government would have to be careful to base the exclusion on a general anti-discrimination law so as to avoid a claim of targeting, but such laws are increasingly common and easily characterized as necessary to protect against invidious discrimination. The reality, however, is that anti-discrimination laws can be manipulated to exclude disfavored expressive and cultural associations. That is especially true where the association (like the BSA) must make membership distinctions to define itself and teach its message.

Anti-discrimination laws typically bar discrimination based on race, national origin, ethnicity, sex, religion, and (increasingly) sexual orientation. However, as this Court noted in *Dale*, various governments also bar discrimination on such diverse grounds as "prior criminal record, prior psychiatric treatment, military status, personal appearance, source of income, place of residence, and political ideology." 530 U.S. at 656 n.2. The number of potential classes which the government can shield from discrimination is virtually limitless and thus can easily be gerrymandered to exclude or disadvantage disfavored groups.

The State in this case engaged in one such gerrymander in the application of its law. As the BSA has noted (Pet. at 4-7 & n.2; *see also* App. at 28a-29a & n.12), the State interpreted its anti-discrimination law to bar groups that discriminate in the selection of adult volunteers – thus excluding the BSA – but not those that discriminate in the provision of services or in youth membership – thus including both the BSA's ideological opponents on the homosexuality issue and less controversial discriminators like the Girl Scouts. But the law itself makes no such distinction – the State simply chose to interpret it that way. *See* App. 57a-61a (Connecticut anti-discrimination laws). The result was to bar the Boy Scouts because of their views on homosexuality while admitting everyone else. The court below reasoned this was merely the "price" the BSA had to pay for exercising its constitutional rights. App. at 26a, n.8.

And the Boy Scouts may pay a heavy price indeed if the decision below stands. The very real danger of the Second Circuit's rule is that it could be used to justify virtually unlimited exclusion of the Boy Scouts from access to all manner of government benefits because of the BSA's inability to comply with various anti-discrimination laws – including those relating to sexual orientation, atheism, sex, past criminal history, etc. If, as the court below held, access to broad-based government programs can be conditioned on forfeiting associational rights, it is difficult to see why government could not exclude the Boy Scouts from the after-hours use of government facilities, *contra Boy Scouts of America v. Till*, 136 F. Supp.2d 1295 (S.D. Fla. 2001) (rejecting that outcome), government-owned lands and waterways, and any other government-controlled place or program whose use can be governed by anti-discrimination laws. Indeed, if the court below is correct that the State's actions are viewpoint/content neutral, then exclusion of the Boy Scouts from

public forums might even be permissible in some instances. The decision below would allow governments across the nation to deny the Boy Scouts all manner of government benefits and access based on the exercise of their constitutional rights.[4]

II. More Broadly, The Decision Below Would Allow The Exclusion Of Faith-Based Nonprofit Organizations From Government Benefits, Facilities And Programs That Are Generally Available To Other Nonprofit Organizations.

The decision below has far-reaching implications beyond the Boy Scouts. If, under the Second Circuit's holding, the BSA can be excluded from government programs, benefits, and facilities because of its protected membership criteria, then there is a significant risk that numerous other groups – especially faith-based organizations like these *amici* – could

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4. This case does not involve a challenge to the eligibility requirements for receipt of a targeted government subsidy nor the requirements for securing a contract to provide specific government services. Of course, the government need not subsidize the exercise of constitutional rights. *See Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 546-51 (1983). And it is certainly free to set constitutionally permissible non-discrimination criteria for government contractors and agents. *See, e.g.*, 41 C.F.R. § 60-1.1 (equal opportunity requirement for federal contractors); Rehabilitation Act of 1973, 29 U.S.C. § 504. But those contexts are very different from the classic unconstitutional condition case where the government makes a benefit (*e.g.*, after-hours use of a government-owned building) broadly available to the public or to nonprofit organizations but then conditions the benefit for a disfavored participant on the relinquishment of a constitutional right. That is exactly what occurred in this case, where nearly a thousand diverse groups were allowed to participate but the BSA was excluded for refusing to give up its rights.

also be excluded.[5] In order to maintain their religious values and pursue their religious missions, religious organizations commonly have religious membership and leadership criteria. Such groups are defined by shared conceptions of God and common commitments to certain religious beliefs and values. The very nature of these organizations and their ability to preserve and express their faith depend on the right to "discriminate" in membership and leadership decisions. For obvious reasons, faith-based groups do not select atheists as their leaders or spokespersons, nor those whose ideology and conduct are fundamentally inconsistent with their core values.

At a time when government regulates and controls access to vast resources – from public lands and numerous important facilities to a wide array of benefits and programs – allowing government to condition access to such resources on faith-based organizations relinquishing their First Amendment rights would be exceptionally dangerous. Government need not coerce directly what it can obtain through a carrot and stick approach to government largess. The State can exert great pressure on religious organizations to abandon their defining characteristics and policies in exchange for access to government benefits. The Court has already rejected that result. *See Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993); *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995).

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5. Catholic institutions, for example, increasingly have become the target of governmental refusals to respect their constitutional rights. Based largely on Catholic religious teachings regarding the sanctity of human life, the sacramental nature of marriage between one man and one woman, and the reservation of the sacrament of Holy Orders to men, Church-related organizations have wrongly been branded "discriminators" by certain individuals and organizations that advocate public policies that conflict with Catholic religious beliefs and teachings.

Yet that is the inevitable outcome of the decision below. The Second Circuit permitted the State of Connecticut to exclude the Boy Scouts from participation in a program available to nonprofit groups of every imaginable description based on its constitutionally protected membership policies regarding homosexuals. The State could just as easily have excluded the Boy Scouts based on its policies denying leadership positions to atheists and the holding would have been exactly the same. The Second Circuit's decision might well authorize exclusion of religious organizations with faith-based membership criteria from government benefits, programs, and facilities that are generally available to all nonprofit organizations. The holding of the court below is contrary to established law and a direct threat not only to the BSA but also to faith-based organizations throughout the nation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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